Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf & Country Club Berhad

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–27 OF 1998
ARIFIN ZAKARIA, ARIFIN JAKA AND NIK HASHIM JJCA
6 AUGUST 2004

Civil Procedure — Appeal — Jurisdiction — Appeal to Court of Appeal — Appeal against decision of High Court under para 8 of Schedule to Courts of Judicature Act 1964 — Whether High Court's decision based premised upon s 145(1) of Local Government Act 1976 — Whether appeal lies with Federal Court and not Court of Appeal — Whether decision to extend time a question of law or discretion — Whether decision a final order or interlocutory

The respondent, the lessee of certain lands, filed an originating motion ('OM') with the High Court appealing against the rate of assessment imposed by the appellant. The appellant objected to the appeal on the ground that the respondent had not paid the amount of rate appealed against as required by s 145(1) of the Local Government Act 1976 ('LGA'). It was not disputed that the respondent paid the said amount after the filing of the OM. To overcome the provision of the proviso to s 145(1), the respondent filed a notice of motion pursuant to para 8 to the Schedule of the Courts of Judicature Act 1964 ('the CJA') for extension of time. The trial judge allowed the respondent's application. The appellant now appealed against the order of the trial judge allowing the said extension of time. The respondent raised a preliminary objection on the ground that this court was not competent to hear the appeal as an appeal against the decision of the trial judge pursuant to s 145 of the Act only lies with the Federal Court. The appellant contended that: (a) the order by the trial judge was not made pursuant to s 145 of the Act but was made pursuant to para 8 of the Schedule to the CJA; (b) the decision to extend time was not a question of law but one of discretion; and (c) the order thereto was not a final order but interlocutory.

Held, allowing the preliminary objection and striking out the appeal:

(1) A distinction could not properly be drawn between a decision of the High Court made pursuant to para 8 of the Schedule to the CJA and a decision made pursuant to s 145(1) LGA. The power conferred by para 8 of the Schedule to the CJA is a general power to enlarge or abridge time as prescribed by any written law for doing any act or taking any proceeding (see para 7).

(2) In any event s 145 of the Act itself does not draw any distinction and the court was of the view that there is no plausible reason to draw such a distinction. As long as the decision was under the originating motion filed under s 145(1) of the Act, the decision thereon, subject to the provisions of the said section, is appealable to the Federal Court (see para 7).

(3) On the issue that the decision for enlargement of time is one of discretion and is not a question of law, it should appropriately be left with the Federal Court for determination (see para 8).

(4) Section 145 does not draw any distinction between a decision that is interlocutory in nature and a decision that is final. The case of *Devan Nair v Yong Kuan Teik* was not the authority for the proposition that where the order or decision was interlocutory in nature, an appeal would lie to this court against such order or decision pursuant to s 67 of the CJA (see para 12).

[**Bahasa Malaysia summary**

Responden, pemegang pajakan kepada sebidang tanah, telah memfailkan melalui usul pemula ('UP') kepada Mahkamah Tinggi terhadap kadar cukai taksiran yang dikenakan oleh perayu. Perayu membantah rayuan atas alasan bahawa responden tidak membayar amaun taksiran sebagaimana yang dikehendaki oleh s 145(1) Akta Kerajaan Tempatan 1976 ('AKT'). Tidak dinafikan bahawa responden telah membayar taksiran tersebut selepas pemfailan UP. Untuk mengatasi peruntukan proviso s 145(1), responden memfailkan notis usul di bawah perenggan 8 Jadual kepada Akta Mahkamah Kehakiman 1964 ('AMK') untuk lanjutan masa. Permohonan responden telah dibenarkan oleh hakim bicara. Perayu kini merayu terhadap keputusan hakim bicara membenarkan lanjutan masa tersebut. Responden membangkitkan bantahan awal bahawa mahkamah ini tidak kompeten untuk mendengar rayuan kerana rayuan terhadap keputusan hakim bicara di bawah s 145(1) AKT hanya boleh dibuat ke Mahkamah Persekutuan. Perayu menjawab bahawa: (a) perintah hakim bicara tidak dibuat di bawah s 145 AKT tetapi sebaliknya dibuat di bawah perenggan 8 Jadual kepada AMK; (b) keputusan untuk melanjutkan masa bukan satu persoalan undang-undang tetapi hanyalah satu perkara budi bicara; dan (c) perintah berkenaan hanyalah satu perintah interlokutori dan bukannya perintah muktamad.

Diputuskan, membenarkan bantahan awal dan membatalkan rayuan:

(1) Perbezaan tidak boleh dibuat di antara keputusan Mahkamah Tinggi yang dibuat di bawah perenggan 8 Jadual AMK dengan yang dibuat di bawah s 145(1) AKT. Kuasa yang diberi oleh perenggan 8 Jadual kepada AMK adalah kuasa am untuk melanjutkan atau mengurangkan masa yang ditetapkan oleh mana-mana undang-undang bertulis bagi mengambil sesuatu tindakan atau memulakan suatu prosiding (lihat perenggan 7).

(2) Memandangkan s 145 Akta tidak membuat sebarang perbezaan dan mahkamah berpendapat tiada alasan munasabah untuk membuat berbezaan itu. Selagi keputusan yang dibuat di bawah saman pemula

difailkan di bawah s 145(1) AKT, keputusan itu, tertakluk kepada proviso seksyen tersebut, yang boleh dirayukan kepada Mahkamah Persekutuan untuk menentukannya (lihat perenggan 7).

(3) Berkenaan dengan isu keputusan untuk melanjutkan masa adalah satu perkara budi bicara dan bukan satu persoalan undang-undang, harus diserahkan kepada Mahkamah Persekutuan untuk menentukannya (lihat perenggan 8).

(4) Seksyen 145 tidak membuat sebarang perbezaan di antara keputusan yang bersifat interlokutori dan yang bersifat muktamad. Kes *Devan Nair v Yong Kuan Teik* bukanlah merupakan autoriti untuk mengatakan bahawa di mana perintah atau keputusan bersifat interlokutori, maka rayuan terhadapnya boleh dibuat ke mahkamah ini di bawah s 67 AMK (lihat perenggan 12).]

Notes

For cases on jurisdiction to hear appeals, see 2(2) *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 881–885.

Cases referred to

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261 (not folld)
Majlis Perbandaran Klang v Zakiyah Samad [2004] 2 MLJ 593 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 67, 68, para 8 of Schedule
Election Offences Ordinance 1959 ss 33, 36, Sch 2
Election Rules r 15
Local Government Act 1976 s 145(1), (5)

R Abraham (Janice Leo with him) (Shook Lin & Bok) for the appellant.
Robert Lazar (Teh Lay Kheng with him) (Shearn Delamore & Co) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

[1] The respondent is the lessee of all lands held under Lots PT 3561 and PT 3557 held under HS(D) 71258 and 71262 respectively in the Mukim of Kuala Lumpur, Daerah Wilayah Persekutuan ('the lands'). Prior to 1 January 1997 the annual value of the lands was assessed at RM3,624,000. In October 1996 the appellant sought to revise the annual value of the lands. Initially the annual value was assessed at RM8,368,200, which after an appeal by the respondent was amended to RM5,700,000. The respondent was informed of this by a notification sent by the appellant to the respondent dated 14 February 1996 and received by the respondent on 17 December 1996.

[2] On 31 December 1996 the respondent filed an Originating Motion ('the OM') with the High Court under s 145 of the Local Government Act 1976 ('the Act') appealing against the decision of the appellant on the ground that the assessment of the annual value of the land was excessive. The appellant objected to the appeal on the ground that respondent had not paid the amount of rate appealed against as required by s 145(1) of the Act. It is not in dispute that the payment was made only on 6 February 1997 that is after the filing of the OM. Section 145(1) of the Act provides:

> 145 (1) Any person who having made an objection in the manner prescribed by section 142 or 144 is dissatisfied with the decision of the local authority thereon may appeal to the High Court by way of originating motion:
>
> Provided that with the filing of the originating motion there shall be paid into the local authority the amount of the rate appealed against.

[3] To overcome the provision of the proviso to s 145(1), the respondent filed a notice of motion dated 9 June 1997 pursuant to para 8 to the Schedule of the Courts of Judicature Act 1964 ('the CJA') for extension of time. The learned judge allowed the respondent's application. Hence the time for payment was extended to 6 February 1997: that is the date when payment was in fact made by the respondent. The appellant now appeals to this Court against the order of the learned judge dated 22 December 1997.

[4] Before us the learned counsel for the respondent raised a preliminary objection against this appeal on the ground that this court is not competent to hear this appeal as the appeal against the decision of the learned judge under s 145 only lies to the Federal Court. In support he cited the provision of s 145(5) of the Act which states:

> (5) From the decision of the High Court either party may appeal on question of law to the Federal Court whose decision shall be final and conclusive.

[5] On the above provision the learned counsel for the respondent contended that no appeal lie to this court against the decision of the High Court.

[6] Encik R Abraham learned counsel for the appellant conceded that ordinarily appeal would lie to the Federal Court from the decision of the High Court as provided in s 145(5) of the Act. This is confirmed by the case of *Majlis Perbandaran Klang v Zakiyah Samad* [2004] 2 CLJ 429 where the appeal from the High Court went straight to the Federal Court and not to this Court. However, he contended that the order of the High Court under appeal does not come within the scope of the provision of s 145(5) of the Act for the following reasons:

(i) it is not an order made pursuant to the provision of s 145 of the Act but made pursuant to para 8 of the Schedule to the CJA;

(ii) the decision to extend time is not a question of law but one of discretion; and

(iii) the order of the High Court is not a final order but an interlocutory order.

[7] On the first point, we do not think a distinction could properly be drawn as suggested by the learned counsel for the appellant between a decision of the High Court made pursuant to para 8 of the Schedule to the CJA and a decision made pursuant to s 145(1) of the Act. The power conferred by para 8 of the Schedule is a general power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding. In the present case the application by notice of motion was made by the respondent to enlarge the time as prescribed by the proviso to s 145(1) of the Act. The court granted the respondent's application. It cannot be denied that the decision of the court to enlarge the time is directly related to the appeal before the court made pursuant to s 145(1) of the Act. In any event s 145 of the Act itself does not draw any distinction as proposed by the learned counsel for the appellant and we are of the view that there is no plausible reason for us to draw such a distinction. We hold that for as long as the decision was under the originating motion filed under s 145(1) of the Act, the decision thereon, subject to the provisions of the said section, is appealable to the Federal Court.

[8] On the issue that the decision for enlargement of time is one of discretion and is not a question of law, we are of the view that, that is an issue which should appropriately be left to the Federal Court to determine. Further we do not see how this issue would support the appellant's case.

[9] The final point raised by the appellant is that the order made by the learned judge was not a final order but an interlocutory order, therefore, relying on the case of *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 an appeal from the decision of the High Court would lie to this Court. Since much reliance had been placed by learned counsel for the appellant on that case it is necessary for us to examine the facts and the decision in that case in some detail. The facts were that the appellant in that case was the successful candidate in an election to the Dewan Rakyat held on 25 April 1964, The result of the election was duly published in the *Gazette* on 11 June 1964, within the required 21 days, the respondent presented to the Registrar of the High Court an election petition on the ground that the appellant was disqualified in that he was not at the time a citizen of Malaysia. The appellant had not appointed a solicitor nor left an address for service, therefore the respondent acting under r 10 of the Election Rules in Sch 2 of the Ordinance, lodged a copy of the petition on the registrar on the last day of service prescribed by r 15. He further advertised a notice of presentation of the petition in the *Gazette* on 23 July 1964 after the 10-day period required by that rule. The election

judge struck out the petition on the ground that it had not been served in accordance with the rules and considering that his order was interlocutory, he gave leave to appeal under s 68(2) of the Courts of Judicature Act. The Federal Court set aside his decision but gave leave to appeal to the Privy Council.

[10] In that case it was held by the Privy Council, inter alia, that if the election judge made a final order it was unappealable but, upon the footing that his order was interlocutory, it was open to the election judge to give leave to appeal and for the Federal Court to entertain it. However, we are of the view that the decision of the Privy Council must be read in the light of the provisions of ss 33 and 36 of the Election Offences Ordinance as amended in 1959, the relevant part of which reads:

> s 33 (1) Every election petition shall be tried by the Chief Justice or by a Judge of the High Court nominated by the Chief Justice for the purpose
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> (4) Unless otherwise ordered by the Chief Justice all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court.
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> 36 At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other, and what person, was duly returned or elected, or whether the election was void, and shall certify such determination:-
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> (a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, the municipal counsel of the federal capital or of any other election that the Election Commission may be authorized to conduct; or
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> (b) to the case of any other election, to the Ruler or Governor of the State.
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> Upon such certificate being given such determination shall be final; and the return shall be confirmed or altered, or the Election Commission or the Ruler or Governor (as the case may be) shall within one month of such determination give notice of election in the constituency, electoral ward or electoral district concerned, as the case may require, in accordance with such certificate.

[11] Lord Upjohn speaking for the Privy Council at p 263 said:

> Looking at sections 33 and 36, while it is clear that section 36 enacts that final orders are not subject to appeal, there is no such limiting words in section 33(4), and it does not seem to their Lordships there is to be found in that section sufficient to overcome the express words of section 67 of the Courts of Judicature Act 1964 already quoted, so as to preclude the bringing of an appeal in an interlocutory matter. This may seem to be curious but, nevertheless, until the law was later altered by statute the same situation arose in this country. In *Harmon v. Park* it was held that although an appeal from the election judge to the Common Pleas Division on a case stated was final, yet upon an interlocutory matter it could be considered by the Court of Appeal. This was followed in *Monkswell v Thompson.*

Accordingly, upon the footing that the order was interlocutory, in their Lordships' opinion, it was open to the election judge to give leave to appeal and for the Federal Court to entertain it.

[12] The Privy Council clearly noted the difference between the provisions of ss 33 and 36 of the Election Offences Ordinance, while s 36 enacts that final orders are not appealable but no such limiting words are found in s 33(4). For that reason the Privy Council held an appeal may be brought against a decision of the election judge in respect of interlocutory matter. Reverting to s 145 of the Act, we find the section does not draw any distinction between a decision of the court which is interlocutory in nature and a decision which is final. For that reason we are of the view the decision of the Privy Council in *Devan Nair* is not applicable to the case before us. Further that case is no authority for the proposition that where the order or decision is interlocutory in nature, an appeal will lie to this Court against such an order or decision pursuant to s 67 of the CJA.

[13] For the above reasons we find that there are merits in the preliminary objection raised by the respondent in that an appeal under s 145 of the Act from any decision of the High Court would only lie to the Federal Court and not to this court. The appeal by the appellant is accordingly struck out. Costs to the respondent, and the deposit is hereby ordered to be paid to the respondent to account of taxed costs.

Appeal struck out.

Reported by Mohd Nizam Hamdan